IN THE

Supreme Court of the United States

OCTOBER TERM 1975

NO. 75-1852

LATHIA PAUL BANKS, JR.,

Petitioner,

v.

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NO.

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v.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Lathia Paul Banks, Jr., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Opinion of the United States District Court for the Northern District of Georgia, Atlanta Division, and of the Court of Appeals for the Fifth Circuit appear in Appendices A and B, respectively.

JURISDICTION

The Court of Appeals for the Fifth Circuit affirmed the opinion of the United States District Court for the Northern District of Georgia, Atlanta Division, denying Petitioner's Motion to Vacate Sentence, 28 U.S.C. 2255. This Court's jurisdiction is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner was denied a fair trial and effective assistance of counsel in violation of the Constitutional guarantee set forth in the Sixth Amendment to the United States Constitution because appointed defense counsel jointly represented Petitioner and his co-defendant.

2. Whether Petitioner was denied effective assistance of counsel in contravention of the Sixth Amendment to the United States Constitution because Petitioner's counsel failed to secure attendance at trial of two crucial defense witnesses.

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment, United States Constitution:

> In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.

PREFATORY STATEMENT

References to the Record of the Motion to Vacate will be cited as "R." and references to the Transcript of the February, 1973 criminal prosecution will be cited as "Tr." Said transcript is found in the record of the Motion to Vacate as Government Exhibit 1.

STATEMENT OF THE CASE

On February 16, 1973, Petitioner and co-defendant, Alvin Dollar, were convicted of violating Title 18 U.S.C. §2114. Thereafter, on August 30, 1974, Petitioner was sentenced to twelve years imprisonment pursuant to 18 U.S.C. §2112 (R. 33-35). Both the judgment and sentences were affirmed on direct appeal, *United States v. Banks*, 485 F.2d 545 (5th Cir. 1973), *cert. denied*, 416 U.S. 987 (1974). Petitioner filed a Motion to Vacate sentence on August 14, 1975. Same was denied on November 24, 1975, and the District Court's opinion was affirmed by the United States Court of Appeals for the Fifth Circuit on May 24, 1976. Petitioner is currently incarcerated at the Federal Correctional Institution, Ashland, Kentucky.

During his trial, which commenced on February 14, 1973, Petitioner and his co-defendant were represented by Attorney Harris Bostic, duly licensed in accordance with the laws of the State of Georgia. Initially, Mr. Bostic was retained by both defendants to represent them at a preliminary hearing, and was later *appointed* by the Court to represent them at trial.

Both Petitioner and his co-defendant testified at the trial, and their testimony was not in conflict, as each presented separate alibi defenses not dependent on the other (R. 4). The Government presented four key witnesses, each of whom made various eyewitness identifications touching Appellant, and his co-defendant.

Roy Richards, the manager of the Government facility which was robbed, testified that he was able to identify Petitioner, but not his co-defendant, at a pretrial lineup (Tr. 48, 69). At trial, Witness Richards did identify both Petitioner and Co-Defendant Dollar (Tr. 34, 36).

The second Government witness, Dorothy Martinez, a cashier, testified that she was able to identify Co-Defendant Dollar, but not Petitioner, at the lineup. She could not identify Petitioner at trial (Tr. 79, 83, 100, 107).

The third prosecution witness, Patricia Ann Mason, at trial, identified Co-Defendant Dollar, stating that she saw him climb over a fence bordering the military reservation where the robbery was committed. She was not able to identify Petitioner as the companion of the co-defendant; however, she testified that she saw Petitioner in the Commissary, both before and after the armed robbery, but was unable to say that he was present on the day of the robbery (Tr. 116-119, 121-124).

The fourth eyewitness for the Government, Susan Hager, testified that earlier on the same day that the robbery took place, she saw Petitioner in the Commissary acting in a suspicious manner; however, she could not make any in-court identification of Co-Defendant Dollar. Moreover, Mrs. Hager's testimony did not relate at all to the actual time period of the robbery (Tr. 158-161).

Petitioner, at trial, offered two lines of defense: Alibi and a foot injury of such severity which would have precluded participation in the robbery of the Commissary. Attorney Bostic placed the issue of the injury to Petitioner's foot into evidence through the testimony of Petitioner, his fiancee, and his father. The latter, Lathia Paul Banks, Sr., testified that he had taken Petitioner to the family doctor, Ferd D. Bradford, Jr., on November 26, 1971, because of a severe injury to his right foot. At this juncture, Attorney Bostic attempted to introduce an x-ray of Petitioner's foot taken by a radiologist at the request of Dr. Bradford. The

District Court refused to admit the x-ray (Tr. 405-407). Dr. Bradford was not called as a witness at trial.

On August 14, 1975, Petitioner submitted, as exhibits to his Motion to Vacate Sentence, Affidavits of Dr. Bradford, Lathia Paul Banks, Sr., and Essie Elizabeth Banks, Petitioner's grandmother, to the effect that there was a total lack of contact between Attorney Bostic and Dr. Bradford; that the Doctor was willing to appear as a witness on behalf of Petitioner; and that had Dr. Bradford appeared at trial he would have testified that Petitioner's foot injury was so severe as to preclude participation in the Commissary Robbery, as that participation was described by the various Government witnesses (R. 79-85).

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT THE WRIT IN ORDER TO RESOLVE A CONFLICT BETWEEN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT AND THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT OVER WHETHER THE TRIAL JUDGE HAS AN *AFFIRMATIVE DUTY* TO INQUIRE WHETHER THE CO-DEFENDANTS HAVE DISCUSSED THE RISKS OF JOINT REPRESENTATION WITH THEIR COUNSEL AND HAVE MADE A CONSIDERED DECISION TO PROCEED WITH THE ONE ATTORNEY; FURTHER, THE COURT SHOULD GRANT THE WRIT AND REMAND THIS MATTER TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT WITH THE PROVISO THAT IN ORDER TO AVOID A MANIFEST INJUSTICE, PETITIONER BE ACCORDED AN EVIDENTIARY HEARING IN THE

DISTRICT COURT TO DETERMINE WHETHER DEFENSE COUNSEL'S FAILURE TO OBTAIN THE TESTIMONY OF TWO CRUCIAL WITNESSES WAS THE RESULT OF DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL OR THE RESULT OF TRIAL STRATEGY.

1. WHETHER PETITIONER WAS DENIED A FAIR TRIAL AND EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE CONSTITUTIONAL GUARANTEE SET FORTH IN THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE APPOINTED DEFENSE COUNSEL JOINTLY REPRESENTED PETITIONER AND HIS CO-DEFENDANT.

Petitioner would contend that because of the manner in which the Government's evidence was received, Attorney Bostic, representing both Petitioner and Co-Defendant Dollar, was confronted with a situation which squarely placed him on the horns of a peculiar adversarial dilemma arising out of the eyewitness identifications made by the four key prosecution witnesses.

Witness Roy Richards, the Commissary Manager, identified both Co-Defendant Dollar and Petitioner at trial. On cross-examination, Attorney Bostic attempted to attack Witness Richards' credibility by focusing on his inability to identify Mr. Dollar at the pre-trial lineup. There was little, if any, cross-examination relating to Petitioner. The next eyewitness, Dorothy Martinez, the cashier, gave testimony almost inverse to that of Mr. Richards. She testified that at the pre-trial lineup, she identified Co-Defendant Dollar, but not Petitioner. Therefore, on cross-examination, Attorney Bostic focused on her inability to identify Petitioner either at

the lineup or in court. The following significant colloquy took place between Attorney Bostic and Witness Martinez:

Q. Now, could this have been the man [Banks] you saw there at Ft. McPherson? Stand up.

A. No, it wasn't.

Q. It wasn't him?

A. It wasn't him.

In this instance, Attorney Bostic, focusing on Mrs. Martinez's inability to identify Petitioner, conducted little, if any cross-examination relating to Co-Defendant Dollar. The next Witness, Pat Mason, made an in-court identification of Co-Defendant Dollar, stating that she saw him climb over the fence bordering the Military Reservation where the robbery took place; she was unable to identify Petitioner as being in the Commissary on the day of the robbery, although she believed she had seen him there on other occasions both before and after the robbery (Tr. 124). The last prosecution eyewitness, Susan Hager, testified that she saw Petitioner acting in a suspicious manner in the Commissary on the same day, but prior to the time that the robbery took place. She could not make an identification of Co-Defendant Dollar (Tr. 159).

Thus, Attorney Bostic was confronted with one eyewitness who identified Petitioner, but not the co-defendant at a pre-trial lineup, and then made an in-court identification of both; a second eyewitness who identified the co-defendant, but not Petitioner, at a pre-trial lineup, and then identified *only* the co-defendant in court; a third eye-witness who made *only* an in-court identification of the co-defendant, but not Petitioner;

and a fourth eyewitness who identified Petitioner as being in the Commissary on the same day, but prior to the robbery, and made no identification whatsoever of the co-defendant. In this posture, Attorney Bostic, in his cross-examination of the four witnesses, was compelled to highlight the failure of a particular eyewitness to identify one of the defendants at the expense of pursuing an exhaustive cross-examination on behalf of the other defendant. Petitioner would submit that in doing so, the attorney was not able to fully develop lines of cross-examination for the particular defendant who *was* identified by the particular Government eyewitness. Petitioner would further argue that the eyewitness identification testimony was such that Attorney Bostic might have been able to argue that the jury could find that only one of the defendants might have been the perpetrator. Such an argument could have been made because neither of the defendants' alibis were dependent on the other's, but Mr. Bostic *could not and did not* make such an argument in his capacity as counsel for both defendants.

Petitioner's contention, simply put, is that the manner in which the Government eyewitness identification testimony developed at trial, and the attendant difficulty that this presented to Attorney Bostic, created an intolerable conflict of interest situation. Clearly, the necessity of highlighting one defendant at the expense of another in a series of consecutive cross-examinations of the four key Government eyewitnesses is extremely prejudicial and would have been nonexistent if both defendants were represented by different counsel. Petitioner submits that Attorney Bostic should have recognized the potential hazard he confronted and brought it to the Court's attention. But even if Attorney Bostic, in good faith, failed to perceive this problem, it is respectfully submitted that the District Court should have, at the outset of the trial, anticipated it, made specific inquiry of the defendants as to whether they recognized the potential conflict of interest, and, failing to obtain their consent, appoint a second attorney. The trial record is devoid of any such judicial inquiry.

The Court of Appeals for the First Circuit, in *United States v. Foster*, 469 F.2d 1(1972), squarely faced the conflict of interest issue arising out of a Motion to Vacate. Foster and a Co-Defendant Harris were tried, convicted and sentenced for selling heroin. The indictment arose from two separate incidents, one occurring on July 7, 1969, and the other on July 18, 1969. Foster alone was convicted on the second sale while both defendants were acquitted on the July 7 charge. At trial, both Foster and Harris were represented by the same retained counsel. Thereafter, Foster filed a Motion to Vacate, claiming a conflict of interest which caused a denial of his Sixth Amendment right to effective assistance of counsel. In analyzing the issue, the First Circuit stated at 4:

> Both common sense and authority, See e.g. *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457 (1942), instruct us to scrutinize the record with great care when such an allegation is made . . . this Court is 'peculiarly sensitive to a showing of conflict of interest, if such can be suggested,' *Marxbach v. United States*, 398 F.2d 548, 552 (1st Cir.) *cert. denied*, 393 U.S. 982, 89 S.Ct. 454, 21 L.Ed.2d 443 (1968), in the same sense that the accused need not delineate the precise manner in which he was prejudiced.

After finding that there was no conflict of interest in that case, the Court of Appeals, at 4-5, proceeded to promulgate, under its supervisory powers, a new rule applicable to each case tried in the District Courts where one attorney speaks for two or more defendants:

> Under those circumstances, where trial commences after the publication date of this opinion [November, 1972] it shall be *the duty of the trial court*, as early in the litigation as practicable, to comment on the risks confronted where defendants are jointly represented to insure that defendants are aware of such risks, and to *inquire diligently* whether they have discussed the risks with their attorney and whether they understand that they may retain counsel, or if qualified, may have such counsel appointed by the court and paid for by the Government. For the time being, at least, we leave to the discretion of the trial court the exact time and form of the inquiry . . . . If the Court has carried out this duty of inquiry, then to the extent a defendant later attempts to attack his conviction on grounds of conflict of interest arising from joint representation he will bear a heavy burden indeed of persuading us that he was, for that reason, deprived of a fair trial. *When a satisfactory inquiry does not appear on the record, the burden of persuasion will shift to the Government.* (Emphasis Added).

Clearly, following *Foster's* caveat, the District Court should have, at the very least, made an inquiry, at the outset of the trial, to determine whether the defendants understood their rights vis-a-vis a possible conflict of interest. This is particularly so in an eyewitness identification case involving two or more defendants. Such a judicial inquiry cannot be found in the trial transcript. Since there was no judicial warning to Petitioner and his co-defendant at the outset of the trial, following the

filing of the Motion to Vacate, the District Court should have held an evidentiary hearing with the burden of persuasion on the Government to establish the unlikelihood of a conflict of interest by a preponderance of the evidence. If the Government was unable to carry its burden, then, following *Foster*, the District Court should have vacated the sentence, set aside the judgment, and ordered a new trial. It is submitted that the District Court's finding that the "burden is on the petitioner to establish that a conflict of interest existed at trial . . ." (Tr. 103) is erroneous under the guidelines set forth in *Foster, supra*. To the extent that the District Court failed to provide Petitioner with such a hearing below, this Honorable Court should remand for further proceedings consistent with the holding in *Foster, supra*.

In a recent opinion, *Foxworth v. Wainwright*, 516 F.2d 1072 (5th Cir. 1975), the Court of Appeals for the Fifth Circuit addressed itself to the conflict of interest problem:

> In this case we address solely the question whether it was error to appoint one attorney for three defendants, and to fail to terminate the joint representation when an actual conflict became apparent. Joint representation by retained counsel is a different question entirely. See *Fitzgerald v. Estelle*, 5 Cir., 1975, 505 F.2d 1334.
>
> The trial judge has an obligation, however, to anticipate conflicts reasonably foreseeable at the outset of the case, when counsel is appointed.[5] (At 1076-1077). ***[Footnote 5] *The trial court is not required, however, to warn codefendants of the disadvantages, including possible conflicts of interest, of joint representation. United States v. Boudreaux*, 5 Cir., 1974, 502 F.2d 557. There is some suggestion

> in our prior decisions that the trial court must be held responsible for failing to foresee conflicts of interest even when they are not reasonably apparent, on the ground that a conviction resulting from an unfair trial cannot be upheld, irrespective of blame. *Porter v. United States*, 5 Cir., 1962, 298 F.2d 461, 464. Because we believe the conflict was reasonably apparent in this case we need not consider whether *Porter* is still viable. See *Fitzgerald v. Estelle*, *supra*. (At 1076) (Emphasis Added).

Thus, Footnote 5 demonstrates the divergence between the First Circuit and the Fifth Circuit on the threshold question of whether the Court has an affirmative duty to "warn co-defendants." The Fifth Circuit holds that no such warning is required; however, the First Circuit requires an affirmative judicial inquiry.

Once the threshold question of whether the Court has an affirmative duty to warn co-defendants of the possible conflict has been addressed (albeit differently), both the First and Fifth Circuit Courts of Appeal *agree* on the degree of prejudice required for reversal, once an actual conflict of interest is found. Both *Foster*, *supra*, and *Foxworth*, *supra*, cite this Court's opinion in *Glasser v. United States*, 315 U.S. 60, 76, 62 S.Ct. 457, 461, 86 L.Ed. 680 (1942), which holds:

> The right to have assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.

Thus, prejudice, as used in connection with the harmless error rule, need not be shown. *See Castillo v. Estelle*, 504 F.2d 1243, 1245 (5th Cir. 1974); *White v. United States*, 396 F.2d 822, 824 (5th Cir. 1968); *Goodson v. Peyton*, 351 F.2d 905, 909 (4th Cir. 1965); *Case v. State of North Carolina*, 315 F.2d 743, 745 (4th Cir. 1963); *Larry Buffalo Chief v. State of South Dakota*, 425 F.2d 271, 380 (8th Cir. 1970). This approach is consistent with the rule that, unlike many trial errors, denial of the right to assistance of counsel calls for automatic reversal of a conviction. *Chapman v. California*, 386 F.2d 18, 23 n. 8, 87 S.Ct. 824, 827-828, 17 L.Ed.2d 705 (1967).

Applying his legal analysis to the facts of the particular case, Judge Ainsworth concluded in *Foxworth*, *supra*, at 1077:

> Under those circumstances, the trial court should have foreseen the substantial possibility that one of the boys might be in a position to further his own defense by showing that a co-defendant, especially an older one, was *solely* responsible for the crime. (Emphasis Added).

Clearly, Attorney Bostic could have and should have made this same argument in the instant case. He was prohibited from making such an argument (one which would have drawn additional strength from the fact that Petitioner and his co-defendant had factually distinctive alibis) by his joint appointed representation. In this posture it was unfair and error for the District Court to place the burden on Petitioner to show that a conflict of interest existed. Petitioner submits the conflict is amply demonstrated on the face of his Motion to Vacate, thus mandating reversal of the District Court's Order. But should this Court not find reversal appropriate, at the very least, there should be a remand for the trial court should have held an evidentiary hearing with the burden of going forward on the Government.

2. WHETHER PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN CONTRAVENTION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE PETITIONER'S COUNSEL FAILED TO SECURE ATTENDANCE AT TRIAL OF TWO CRUCIAL DEFENSE WITNESSES.

At trial, Attorney Bostic placed the issue of Petitioner's injured foot into evidence through his testimony, and that of his fiancee and father. To corroborate the testimony of Petitioner's father that the latter had taken Petitioner to the family doctor, Ferd D. Bradford, Jr., on November 26, 1971, because of a severe injury to the foot, Mr. Bostic attempted to place into evidence an x-ray of the foot taken by a radiologist at the request of Dr. Bradford. Refusing to admit the x-ray, the following colloquy took place between the District Court, Lathia Paul Banks, Sr. and Attorney Bostic:

> THE COURT: I would have to sustain the objection, Mr. Bostic. Unless the doctor who made it or some professional person can identify that and testify in regard to it, it wouldn't be admissible.
>
> QUESTION (BY BOSTIC): Mr. Banks, did you try to get the doctor to come to Atlanta to testify today?
>
> ANSWER: Yes, sir, I did no later than last night . . . and he's ill and couldn't come. (Tr. 405-407).

In this posture, even a cursory reading of the trial transcript demonstrates that Dr. Bradford's testimony was crucial to corroborate Petitioner's and his family members' claim that his leg was so severely injured that he could not have participated in the Ft. McPherson

Commissary robbery, and to lay the proper foundation for the admissibility of the x-ray. Yet, Dr. Bradford did not appear at the trial.

Exhibits H, I, and J to the Motion to Vacate (R. 79-85) unequivocally demonstrate that there was a remarkable lack of contact between Attorney Bostic and Dr. Bradford; that Dr. Bradford was willing to appear as a witness after the doctor's illness had passed; that had he appeared at Petitioner's trial, he would have testified that the foot injury was so severe as to preclude participation in the Commissary robbery as said participation had been described by eyewitnesses. The Affidavit of Essie Banks, Petitioner's grandmother, demonstrates that she would have testified that she saw Petitioner after he returned to Atlanta from Birmingham and observed the severity of his foot injuries for a period of several days (R. 84-85).

Petitioner submits that Attorney Bostic had a duty to secure the attendance of Dr. Bradford and Essie Banks. The record is clear that the District Court recognized the importance of the doctor's testimony (Tr. 407-410) and that Attorney Bostic neither personally interviewed these key defense witnesses nor sought a continuance to secure their important, if not pivotal, testimony. Without the doctor, the foot injuries' severity must have remained rather abstract in the minds of the jury. As respected members of every community, the testimony of a medical doctor, common experience tells us, often has a traumatic impact on the outcome of litigation. There is a substantial likelihood that the jury would have reached a verdict of acquittal on the testimony of the doctor and Essie Banks. There could be no strategic reason for Mr. Bostic not to have made

the most strenuous effort to secure the doctor's attendance. With the proper offer of proof, the Court would have been compelled to grant a short continuance until the doctor was well enough to make the short trip to Atlanta.

In *United States v. Yodock*, 224 F.Supp. 877 (D.C. M.D. Penn. 1963), Chief Judge Sheridan vacated judgment and sentence and granted a new trial where it appeared that defense counsel should have moved for a continuance because of insufficient time to prepare a defense. In that case, the Government argued that the Motion to Vacate must be denied because counsel failed to request a continuance. The Court did not find this to be a bar to the Motion, stating at 882:

> The fact that no continuance was requested is not important, particularly under the circumstances of the case . . . the court should not have permitted the trial since they knew the defendant had just been arraigned and that counsel had no time whatsoever to prepare the defense.

Yodock is analogous to the case at bar in that it appears from the record that Attorney Bostic should have requested a continuance after it became apparent that Dr. Bradford's testimony was crucial, that the doctor was ill, and that the needed x-ray could not be admitted into evidence without the doctor's testimony. No mention of a request for continuance appears on the record. Moreover, there is no waiver by the Petitioner. It would appear, therefore, that Attorney Bostic proceeded to conclude the defense case without making the necessary motion for continuance and, therefore, failed to contact the doctor and secure his testimony at trial. The trial transcript does not indicate any trial strategy employed by Mr. Bostic which might have resulted in

a decision not to endeavor to secure the medical testimony.

Since there was no apparent strategical reason for not calling Dr. Bradford or Mrs. Banks, Petitioner would contend that he has made sufficient minimal showing to entitle him to a full evidentiary hearing on this point. Thus, this Honorable Court should, at the very least, remand this issue for further proceedings.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinions of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the within and foregoing Petition for Writ of Certiorari upon Assistant United States Attorney William Bartee, United States District Court, Northern District of Georgia, Atlanta Division, United States Courthouse, Atlanta, Georgia, by depositing same in the United States Mail in a properly addressed envelope with adequate postage thereon.

This the 18th day of June, 1976.

/s/ MARK J. KADISH

MARK J. KADISH
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Atlanta, Georgia 30303

APPENDIX

APPENDIX A

(Filed in Clerk's Office November 24, 1975,
Ben H. Carter, Clerk, by P.L.D., Deputy Clerk)

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

LATHIA PAUL BANKS, JR. vs. UNITED STATES OF AMERICA	CIVIL ACTION NO. C75-1601A

ORDER

The petitioner, Lathia Paul Banks, and a co-defendant, Alvin Radford Dollar, were convicted by this court of armed robbery of the post commissary at Fort McPherson, Georgia, in violation of 18 U.S.C. § 2112. Each defendant was sentenced to 12 years imprisonment. Both the judgments and the sentences were affirmed on appeal. *United States v. Banks*, 485 F.2d 545 (5th Cir. 1973), *cert. denied*, 416 U.S. 987 (1974). Presently before the court is petitioner's motion to vacate the sentence, 28 U.S.C. § 2255, which is essentially predicated upon two grounds: (1) ineffective assistance of counsel;[1] and (2) newly discovered evidence.

As one basis of his claim of ineffective assistance of counsel, the petitioner alleges that Mr. Bostic, the attorney who represented both him and his co-defendant,

[1] It should be noted at the outset that Mr. Bostic was initially retained to represent both defendants. It was only after the defendants became unable to pay Mr. Bostic that the court appointed him to represent the defendants.

did not render effective service to the petitioner because of a conflict of interest. This conflict allegedly arose when Bostic had to cross-examine certain government witnesses. The witnesses, their testimony, and the alleged conflicts are as follows:

1. Roy Richard, the commissary manager, identified both Banks and Dollar in the courtroom as the perpetrators of the crime. At the pretrial lineup, however, Mr. Richards was able to identify only the petitioner. The petitioner's claim of conflict is that the attorney, by focusing on the witness' inability to identify co-defendant Dollar at the pretrial lineup, conducted little cross-examination relating to the petitioner.

2. Dot Martinez, the commissary cashier, identified co-defendant Dollar at both the lineup and trial but failed to identify petitioner at either stage of the proceedings. Petitioner's objection is, oddly enough, the reverse of the objection made above. In this instance, the petitioner contends that the major portion of the cross-examination related to the witness' inability to identify the petitioner and did not relate to co-defendant Dollar.

3. Pat Mason identified Dollar but was unable to identify petitioner, and Susan Hager identified the petitioner but was unable to identify Dollar. The petitioner's objections to Mr. Bostic's cross-examination of these two witnesses is consistent with the objections made above.

It is well settled that joint representation of two or more co-defendants is not per se improper. *United States v. Fannon*, 491 F.2d 129 (5th Cir. 1974); *United States v. Foster*, 469 F.2d 1 (1st Cir. 1972). The burden is on the petitioner to establish that a conflict of interest

existed at the trial and that this conflict was not irrelevant or merely hypothetical. *Foxworth v. Wainwright*, 516 F.2d 1072 (5th Cir. 1975); *Burston v. Caldwell*, 506 F.2d 24 (5th Cir. 1975). In this case, the petitioner has failed to carry that burden.

The court has reviewed the transcript and is not convinced that there was any conflict. The fact that Mr. Bostic might not have pursued as strongly as petitioner desired the ability of a particular witness to identify the petitioner is clearly not the result of a conflict of interest. It appears that Mr. Bostic could have and did effectively cross-examine the government witnesses on behalf of both defendants.

The second basis of petitioner's claim of ineffective assistance of counsel is Mr. Bostic's failure to secure the attendance at trial of Dr. Bradford, who would have testified that the petitioner's foot was badly sprained at the time of the crime and he could not possibly have jumped a very high fence. Evidence supporting this claim was introduced at the trial through the testimony of petitioner, his fiancee, and his father.

It is well settled in this circuit that the constitutional command of effective assistance of counsel "is for a battle, not a victory. . . ." *United States v. Rubin*, 433 F.2d 442, 444 (5th Cir. 1970); *Odom v. United States*, 377 F.2d 853 (5th Cir. 1967). The standard by which counsel's representation of his client is judged has been consistently articulated as follows:

> We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.

MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960);

Burston v. Caldwell, supra; Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974); *United States v. Rubin, supra; Odom v. United States, supra*. Given that the counsel's representation meets this standard,

> decisions as to whether or not to call certain witnesses to the stand, whether to ask or refrain from asking certain questions, and the like, are tactical determinations. Errors, even egregious ones, in this respect do not provide a basis for postconviction relief.

433 F.2d at 445. In the present case, this court is convinced that Mr. Bostic more than satisfied the standard governing effective assistance of counsel.

The second ground upon which the petitioner bases his motion to vacate is properly characterized by the government as more in the nature of a motion for a new trial based upon newly discovered evidence. This evidence consists of the results of polygraph examinations conducted subsequent to the trial. Obviously, this evidence supports the petitioner's claim that he is innocent.

Evidence of polygraph examinations, however, is inadmissible in criminal cases. *United States v. Cochran*, 499 F.2d 380 (5th Cir. 1974); *United States v. Pacheco*, 489 F.2d 554 (5th Cir. 1974). Accordingly, the results of the polygraph examinations presented by the petitioner cannot possibly satisfy the showing necessary in order to obtain a new trial. *See United States v. Rubin, supra; United States v. Jacquillon*, 469 F.2d 380 (5th Cir. 1972); *Weiss v. United States*, 122 F.2d 675 (5th Cir. 1941).

Based on the foregoing discussion, the petitioner's motion to vacate his sentence is hereby DENIED.

IT IS SO ORDERED this 24th day of November, 1975.

/s/ WILLIAM C. O'KELLEY

WILLIAM C. O'KELLEY
United States District Judge

APPENDIX B

Lathia Paul BANKS, Jr.,
Petitioner-Appellant,

v.

UNITED STATES of America,
Respondent-Appellee.

No. 76-1014
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

May 24, 1976.

Defendant filed postconviction motion to vacate sentence. The United States District Court for the Northern District of Georgia, at Atlanta, William C. O'Kelley, J., entered a judgment denying petition and defendant appealed. The Court of Appeals held that defendant failed to establish denial of effective assistance of counsel or error by district court in failing to grant new trial on presentation of postconviction polygraph evidence of innocense.

Affirmed.

Criminal Law 997.15(5)

Defendant moving to vacate sentence failed to establish denial of effective assistance of counsel because of representation of a codefendant and allegedly resultant inadequate cross-examination of witnesses and failure to secure attendance of two potentially favorable witnesses or error by district court in failing to grant new

*Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir., 1970, 431 F.2d 409.

trial on presentation of postconviction polygraph evidence of defendant's innocence. 28 U.S.C.A. § 2255.

Appeal from the United States District Court for the Northern District of Georgia.

Before BROWN, Chief Judge, GEWIN and MORGAN, Circuit Judges.

PER CURIAM:

Lathia Paul Banks, Jr., appeals from the district court's denial of his post-conviction motion to vacate sentence, 28 U.S.C. § 2255. We affirm.

The appellant raises the following issues which we have examined and found to be without merit: (1) Denial of effective assistance of counsel due to counsel's representation of a codefendant and resultant inadequate cross-examination of witnesses; (2) denial of effective assistance of counsel due to counsel's failure to secure the attendance at trial of two potentially favorable witnesses; and (3) failure of the district court to grant a new trial upon appellant's presentation of post-conviction polygraph evidence of his innocence.

AFFIRMED.

No. 75-1852

In the Supreme Court of the United States

OCTOBER TERM, 1976

LATHIA PAUL BANKS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 531 F. 2d 1336. The order of the district court (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1976. The petition for a writ of certiorari was filed on June 23, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied the effective assistance of counsel at trial where he and a co-defendant whose interests were not conflicting were represented by the same attorney.

2. Whether counsel's failure to secure the attendance of two potential defense witnesses at trial denied petitioner effective assistance.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner and co-defendant Alvin Radford Dollar were convicted of armed robbery of a military commissary, in violation of 18 U.S.C. 2112, and were sentenced to twelve years' imprisonment. The court of appeals affirmed. *United States* v. *Banks*, 485 F. 2d 545 (C.A. 5), certiorari denied, 416 U.S. 987. Thereafter, petitioner filed the instant petition pursuant to 28 U.S.C. 2255 seeking vacation of his sentence. The district court denied relief (Pet. App. A), and the court of appeals affirmed (Pet. App. B).

As fully set forth in the opinion of the court of appeals on direct appeal and in our brief in opposition to petitioner's original petition for a writ of certiorari (No. 73-5889), the evidence showed that four eyewitnesses identified petitioner and Dollar as the two men who robbed the post commissary at Fort McPherson, Georgia, at approximately 6:00 p.m. on December 17, 1971. The commissary manager identified both men at trial as the perpetrators of the robbery, although he had been able to identify only petitioner, and not Dollar, at a pretrial lineup (Tr. 34-36, 48). Susan Hager, another eyewitness, testified that she had observed petitioner's suspicious actions in the commissary earlier on the day of the robbery; she was, however, unable to identify Dollar (Tr. 159-161). Dorothy Martinez, the commissary cashier, identified Dollar at both the lineup and trial but failed to identify petitioner as one of the robbers

on either occasion (Tr. 79, 86-87). Patricia Mason also identified Dollar as one of the persons whom she saw climb over the base fence near the commissary shortly after the robbery; however, she was unable to identify petitioner (Tr. 121-122).

In their defense, petitioner and Dollar relied upon wholly unrelated alibi claims. Petitioner testified that he had been with his fiancee at the time of the robbery, and she supported his contention that he had been at her apartment from approximately 5:00 p.m. onward on the night of the robbery (Tr. 345). Petitioner also contended that he could not have climbed the fence to escape from the commissary, as witness Mason described the robbers' actions, because he was then suffering from a severely sprained ankle (Tr. 373-379). Petitioner's father and his fiancee corroborated this aspect of his testimony (Tr. 406). Dollar claimed that he had been delivering packages with a social worker at the time of the robbery (Tr. 354-355).

ARGUMENT

1. Petitioner contends (Pet. 6) that his trial attorney's joint representation of both himself and his co-defendant, with whom he alleges he had an irreconcilable conflict of interest, deprived him of the effective assistance of counsel. He claims that, because of his dual obligations, counsel was constrained in his cross-examination of the two government witnesses who identified petitioner as one of the robbers by his obligations to defendant Dollar and, similarly, could not develop the plausible argument that only Dollar, and not petitioner, had been involved in the robbery. However, after carefully reviewing the transcript, the courts below correctly found (Pet. App. 3a, 2b) that there was no conflict of interest

between petitioner and Dollar and thus no impropriety in their joint representation.

A criminal defendant is entitled to the assistance of counsel whose efforts are not impaired by the necessity of simultaneously representing possibly inconsistent interests. *Glasser* v. *United States*, 315 U.S. 60, 70. A conflict of interest is present whenever one co-defendant stands to gain significantly by counsel adducing probative evidence or advancing arguments that are damaging to the cause of another co-defendant whom that attorney also represents. See *Foxworth* v. *Wainwright*, 516 F. 2d 1072, 1076 (C.A. 5). In the instant case, there was no such conflict because the defendants' defenses were entirely consistent and were based on wholly independent alibi testimony and evidence concerning their personal reputation and character.[1]

Defense counsel thoroughly cross-examined the government's witnesses on behalf of both defendants (Pet. App. 3a). Counsel specifically inquired into the conditions at the pre-trial lineup, at which at least one eyewitness identified each defendant, and challenged the strength of the in-court identifications based upon the eyewitnesses' observations during the robbery. Counsel's failure to attack his identification by two of those witnesses as strongly as petitioner now deems appropriate was not

[1]Both defendants denied being at the army base on the day of the holdup and introduced separate alibi testimony of their whereabouts at the time of the robbery. From the nature of their protestations of non-involvement with the robbery scheme and absence from the scene of the crime, neither defendant could, consistently with his own defense, have inculpated the other. Thus, it was not the fact of joint representation but the content of petitioner's defense that prevented counsel from presenting a plausible argument that Dollar was guilty and petitioner innocent.

caused by counsel's oversolicitude for Dollar's defense at petitioner's expense. Those witnesses had already testified on direct examination that they were unable to identify Dollar as one of the robbers; thus, counsel's cross-examination was not hindered in the slightest degree by an inconsistent obligation to petitioner's co-defendant. Rather, counsel's decision not to attack the witnesses' unequivocal identifications more forcefully, thereby running the risk of emphasizing their testimony, was a purely tactical decision "clearly not the result of a conflict of interest" (Pet. App. 3a).

Petitioner also claims (Pet. 8-10) that the district court erred at the outset of the trial in not advising him and his co-defendant of the potential dangers of joint representation by one attorney and in failing to inquire into the possibility of a conflict of interest in their respective defenses. However, as we have shown, petitioner has not demonstrated that there was any conflict between his position and Dollar's or that he was prejudiced in any way by their joint representation. In any event, the possibility that a substantial conflict of interest might arise during the course of the trial was not reasonably foreseeable at the time counsel was appointed. Under these circumstances, no court of appeals has held that a district court violates any constitutionally protected right by failing to inquire into the possibility of a conflict of interest or failing to warn a defendant of the possible risks in joint representation and his right to appointment of another attorney.[2] While two

[2]See, *e.g.*, *Foxworth* v. *Wainwright*, 516 F. 2d 1072 (C.A. 5); *United States* v. *Alberti*, 470 F. 2d 878, 881-882 (C.A. 2), certiorari denied, 411 U.S. 919; *United States* v. *Williams*, 429 F. 2d 158 (C.A. 8), certiorari denied, 400 U.S. 947; *Fryar* v. *United States*, 404 F. 2d 1071 (C.A. 10), certiorari denied, 395 U.S. 964;

courts of appeals have, in the exercise of their supervisory powers, ordered the district courts in their jurisdictions affirmatively to determine at the time counsel is appointed that co-defendants understand the risks of joint representation and knowingly elect to be represented by the same counsel (see *Campbell* v. *United States,* 352 F. 2d 359 (C.A. D.C.); *United States* v. *Foster,* 469 F. 2d 1 (C.A. 1)), such an exercise of supervision presents no conflict warranting review.

2. Petitioner also contends (Pet. 15) that counsel's failure to secure the attendance of two potential defense witnesses at trial constituted ineffective assistance. Petitioner claims that Dr. Fred Bradford, who allegedly had examined his injured foot three weeks before the robbery, and his grandmother, who also was familiar with his injury, were vital witnesses whose testimony would have been "pivotal" (Pet. 15). This claim was considered and rejected by the courts below and does not warrant review by this Court.

Through the testimony of petitioner, his fiancee and his father, defense counsel introduced ample evidence supporting petitioner's claim that a disabling foot injury made it impossible for him to have participated in the robbery. Thus, the testimony of Dr. Bradford and petitioner's grandmother would merely have been cumulative of other evidence already before the jury. Counsel's failure to call them therefore cannot justify the award of a new trial. Moreover, decisions "as to whether or not to call certain witnesses to the stand * * * are tactical determinations." *United States* v. *Rubin,* 433 F. 2d

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Glavin v. *United States,* 396 F. 2d 725 (C.A. 9), certiorari denied, 393 U.S. 926.

442, 445 (C.A. 5). It is well established that the tactical conduct or strategic miscalculations of counsel afford no constitutional grounds for relief. *McMann* v. *Richardson,* 397 U.S. 759, 771; *United States ex rel. Walker* v. *Henderson,* 492 F. 2d 1311 (C.A. 2), certiorari denied, 417 U.S. 972.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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